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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 625

ESTATE OF MARY LOIS K. MCINTOSH, deceased, RUSSELL L. MCINTOSH and EMPIRE TRUST COMPANY, Executors, et al.,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above-entitled cases on August 30, 1957.

Opinions Below

The findings of fact and opinion of the Tax Court of the United States (6a-27a)[1] are reported in 25 T.C. 794.

[1] References so numbered are to the pages so numbered of the Appendix to Brief for Petitioners in the Court of Appeals, filed herewith.

The opinion of the Court of Appeals (Appendix A, *infra*, pages 15-22) is reported in 248 F. 2d 181.

Jurisdiction

The judgments of the Court of Appeals (Appendix B, *infra*, pages 23-26) were entered on August 30, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Whether on the record in the Tax Court of the United States that court was justified in deciding that the relinquishment by Decedent in 1943 of a power to appoint by will the corpus of an *inter vivos* trust was "in contemplation of . . . death" within the meaning of Section 811(d)(2) of the Internal Revenue Code of 1939.

Whether, as the Second Circuit has held, a supportable finding that the dominant motive for a transfer was the saving of estate taxes is, without more, sufficient basis for holding that the transfer was "in contemplation of death".

Whether the Act of September 23, 1950, Section 501(a), 64 Stat. 962, is properly to be taken into account in answering the questions previously stated in the estates of persons dying prior to the effective date of that Act.

Statutes Involved

Section 811(d)(2) of the Internal Revenue Code of 1939 is printed in Appendix C, *infra*, page 27.

Section 501(a) of the Act of September 23, 1950, is printed in Appendix C, *infra*, pages 27-28.

Statement

This petition relates to three proceedings, all involving the same issues as to a single estate tax. The Petitioner in the first proceeding is the Estate of Mary Lois K. McIntosh, deceased. The Petitioners in the second and third proceedings are transferees of the trust assets on Decedent's death, the Petitioners in the second proceeding being the trustees of the *inter vivos* trust, and the Petitioner in the third proceeding being Decedent's son, the transferee of the trust assets under the terms of the trust.

The transferees having conceded transferee liability if the assets of the trust are includible in Decedent's gross estate for estate tax purposes (30a), the three petitions in the Tax Court were consolidated for hearing and decision there. The three petitions to review the decisions of the Tax Court were consolidated for briefing and hearing in the Court of Appeals.

Decedent died on May 21, 1949, at the age of 63 years and 9 months (28a).

In 1928 Decedent inherited, on the death of her mother, property in which her mother had had a life estate, consisting of an undivided interest in various parcels of downtown St. Louis real estate and some securities (72a, 73a). Being worried by her then husband's recent management of certain other property of hers, which had resulted in a substantial loss, and for the protection of her property for herself and her heirs, she arranged for the creation of a trust of the property recently inherited by her (7a, 61a-62a, 70a-71a).

This was accomplished by Decedent's conveying the property to Thomas J. Boland, an attorney in the office of Paul Bakewell, Jr., and Boland's conveying the property

on the same day to St. Louis Union Trust Company and Paul Bakewell, Jr., as trustees under a trust deed, Exhibit 1, 31a-37a (29a). The trust was created as a spendthrift trust (8a). The trust deed provided for the distribution of income to Decedent during her life (32a), and provided further that on Decedent's death the principal should go to such persons and under such terms and conditions as Decedent might by her last will direct (35a) with a gift over to Decedent's heirs in default of her exercise of such power by her last will (35a-36a).

By Section 403(a) of the Revenue Act of 1942 (56 Stat. 942), Section 811(f) of the Internal Revenue Code of 1939 was amended to provide for inclusion in the gross taxable estate of unexercised [2] (as well as exercised) general powers of appointment, and by Section 403(d)(3) of the 1942 Act (56 Stat. 944) it was further provided that this amendment of Section 811(f) should not apply to general powers of appointment released before January 1, 1943.[3]

Decedent released her power of appointment under the trust deed on November 4, 1943. It was this release of power which the Tax Court, affirmed by the Court of Appeals, held ground for inclusion of the trust assets in the Decedent's gross taxable estate under Section 811(d)(2) of the Internal Revenue Code of 1939. We state the background:

Upon the enactment of the Revenue Act of 1942, the St. Louis Union Trust Company adopted a policy of writ-

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[2] In 1941 Decedent had executed a will specifically excluding any property over which she had a power of appointment (69a).

[3] The date before which general powers might be so released was extended from time to time by later legislation. The second such extension, to March 1, 1944, was by Public Law 68, 78th Cong., 1st Sess.

The relevant portions of Section 403 of the Revenue Act of 1942 are printed in Appendix C, *infra*, pages 28-29.

ing to all beneficiaries having a power of appointment under a will or trust indenture (30a). Pursuant to this policy the Trust Company wrote Decedent on May 27, 1943, at Darien, Connecticut, where she then lived, referring to the Boland trust and to the 1942 Act and advising her to consult her attorney (Exh. 4, 38a).

Decedent replied by letter of June 1, 1943 (Exh. 5, 39a):

> "I am in receipt of your letter regarding the trust I made with you some years ago. The situation of change of laws etc. has been brought to my attention. I am perfectly willing to give up all powers of determination and every other right that I may have except that I would still want my husband, Russell L. McIntosh to still act as co-trustee [4] with all the powers invested in him as heretofore. If this meets the conditions necessary to protect me under the new law you may make such revisions as necessary, if you are so permitted under the law, thus relieving me of the necessity of employing counsel. If however you think it advisable to avail myself of independent advice as you have indicated in your letter would it be possible to indicate this to me . . ."

The Trust Company replied by letter of June 3, 1943 (Exh. 6, 40a-41a), repeating its advice that Decedent consult her attorney.

Decedent's husband thereupon in her behalf consulted Mr. McNamara of the New York City law firm of McNamara & Seymour (67a); and on June 23, 1943, Mr. McNamara wrote him in part as follows (Exh. 7, 41a-43a):

> "I received the copy of the Deed of Trust and the letter to Lois from Mr. Davis, St. Louis Union Trust Company, June 3, 1943, and copy of Lois' Will, dated July 14, 1941.

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[4] Decedent had married Russell L. McIntosh in 1931 (62a-63a), and he had been appointed in 1934 successor individual trustee to succeed Paul Bakewell, Jr. (11a, 36a).

"I have examined the Trust Deed and the Will. It is clear that under the Internal Revenue Code, as amended by the Revenue Act of 1942, the trusteed property will be taxable as a part of her estate, whether or not the power of appointment be exercised by Lois, unless it has been released by her effectively before March 1, 1944.

"The original time permitted for a release would expire July 1 next. But this has been extended by the new Current Tax Payment Act of 1943 to March 1, 1944. This amendment is quite specific, and provides that a Release of a Power of Appointment before March 1, 1944 shall not be deemed a transfer of property by the individual possessing such power.[5]

"The provision of Article Fifth of the Will, to the effect: 'but specifically not including in this my Last Will and Testament any property over which I may have a power of appointment created by deed or Will'—is not sufficient to constitute a release of the power of appointment of which Lois is the donee under the Trust Deed. . . .

"Under the law as it is now, the position of the donee of a power of appointment is that if the power be exercised during life, a gift tax is incurred. If the power be exercised by Will, an estate or inheritance tax is incurred in respect of the property to which the power of appointment applies, as it is deemed included in the estate of the testator. But, more than this, the property covered by the power of appointment is deemed also included in the testator's estate, for estate or inheritance taxes in cases where the power of appointment is not exercised, and where the testator takes no action about it. In other words, inaction is not sufficient. There must be an express release to avoid the tax. . . ."

Thereupon the firm of McNamara & Seymour prepared the release of Decedent's power of appointment (Exh. 8,

[5] The reference is to § 10 of the Act, amending Section 452(c) of the Revenue Act of 1942 with respect to gift taxes.

44a-46a) which she executed on November 4, 1943 (29a-30a).

Petitioners conceded below that on the present issue Decedent's power of appointment is to be deemed a reserved power rather than a donated power, and that the Tax Court was right in holding that the provisions of Section 403 of the Revenue Act of 1942 referred to above were therefore not applicable (see the opinion of the Tax Court, 24a, fn. 2). The advice given to Decedent in that regard was therefore mistaken, but honestly mistaken since neither Mr. McNamara nor the officer of the Trust Company who communicated with Decedent (74a) was familiar with the background of the "Boland trust" and neither had reason to know that the power would be treated for tax purposes as a reserved power.

The Tax Court found (14a):

> ". . . At the time she executed the release of power of appointment decedent was in good physical condition for a woman of her age, and she had no particular concern about dying."

This finding is supported, and indeed required, by the evidence (52a-60a, 64a-66a).

Reasons for Granting the Writ

This case presents an opportunity for much-needed development by this Court of an important question of federal law,—the proper application of the "contemplation of death" provisions of the estate tax statutes. That question was extensively dealt with in *United States* v. *Wells*, 283 U. S. 102 (1931). The decision below, which we believe to be in conflict with the rationale of that decision of this Court, at least reveals one basic aspect of the general question which is still to be settled by this Court (and which, we submit, was wrongly decided below).

The essence of the decision of the Second Circuit in this case is in the following paragraph of its opinion (Appendix A, *infra*, page 21):

> "This brings us to the final question, is the finding that the decedent relinquished the power in contemplation of her death a proper one upon this record? Although conceding that when she made the release decedent was in good physical condition and had no particular concern about dying, the court found that her purpose in releasing the power was to save estate taxes,—this was her 'dominant motive.' The evidence sufficiently sustains that finding. We see no basis on which it could be held to be clearly erroneous. This court has sustained a holding that transfers were made in contemplation of death when their preponderant motive was avoidance of estate taxes. *Slifka* v. *Johnson*, 2 Cir., 161 F. 2d 467, following *Vanderlip* v. *Commissioner*, 2 Cir., 155 F. 2d 152. The record abundantly justified a finding that 'the thought of death [was] the impelling cause' of the release.[4]"
>
> "[4] The quoted language is from *United States* v. *Wells*, 283 U. S. 102, 118."

The rationale of this paragraph is that a supportable finding that the saving of estate taxes is the dominant motive for a transaction is, without more, ground for holding that the transaction was in contemplation of death.

This is a doctrine developed especially in the Second Circuit (see, *e.g.*, *Farmers' Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794 [1938], cert. den. 306 U. S. 648 [1939], and *Vanderlip* v. *Commissioner*, 155 F. 2d 152 [1946], cert. den. 329 U. S. 728 [1946], cited in the above quotation).[6] It has not yet been adopted by this Court (*cf. Allen* v. *Trust Company of Georgia*, 326 U. S. 630 [1946], discussed at page 12, *infra*).

[6] The doctrine has been accepted in other circuits (*e.g.*, *Rickenberg* v. *Commissioner*, 177 F. 2d 114 [9 Cir., 1949], cert. den. 338 U. S. 949 [1950]).

The doctrine is one which should be reviewed and, we submit, rejected by this Court. *Vanderlip* v. *Commissioner*, *supra*, relied in part on *United States* v. *Wells* (155 F. 2d at 154):

> ". . . United States v. Wells, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867, remains the controlling authority. In the words of Hughes, C. J., 283 U. S. at page 117, 51 S. Ct. at page 451,—'the dominant purpose is to reach substitutes for testamentary dispositions,' and 'the differentiating factor must be found in the transferor's motive. . . .'"

To be properly understood, this portion of the *Wells* opinion must be quoted more fully (283 U. S. at 116-117):

> ". . . The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, *ante*, p. 15. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. . . ."

The sentence last quoted speaks of a motive "of the sort which leads to testamentary disposition". A motive to save estate taxes cannot be so described. The distinction is recognized by the Treasury itself in Regulation 105 promulgated under the Internal Revenue Code of 1939, Section 81.16, cited below by the Commissioner:

> ". . . A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, *or* as a substitute for a testamentary disposition of the property, *or* for any other motive associated with death. . . ." (italics ours)

This Court, in *Wells*, was speaking not of a motive to save estate taxes but of a motive for making a *transfer* in the nature of a testamentary disposition, a transfer the impelling cause of which is "the thought of death". This Court wrote:

> "... It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive . . ." (283 U. S. at 115)
>
> "As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. *The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer*, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.' " (283 U. S. at 117-118; italics ours)

The present case raises the basic question, being a case in which the *Wells* doctrine and the Second Circuit doctrine must reach opposite results. Under Decedent's 1941 will, which refrained from exercising the power of appointment, the trust assets would at her death go under the terms of the trust deed to her son Eugene Kilpatrick Perry. Under the relinquishment of power of November

4, 1943, the trust assets went to him in the same way. There was thus no change, by the relinquishment of the power, in the contemplated disposition of the trust assets at Decedent's death.

It is indisputable also, on this record, that (except under the Second Circuit doctrine that a motive to save estate taxes is sufficient in itself) Decedent's relinquishment of her power of appointment was not motivated by "the thought of death". A holding on this record that such was her motive would wholly distort the evidence. The Tax Court itself found that at the time she executed the release Decedent was in good physical condition for a woman of her age and had no particular concern about dying (page 7, *supra*). Decedent was told, in the letters that she received in May and June of 1943, that her release of her power of appointment would avoid an estate tax newly imposed by the Revenue Act of 1942. She was told also that what she did was in conformity with tax statutes currently enacted, and she would naturally have regarded the enactment of those statutes as an official invitation to do what she did. She was told in the letter from Mr. McNamara that the Current Tax Payment Act of 1943 provided that such a release should not be deemed a transfer of property by the individual possessing such a power; understanding from this that she was not making any transfer, Decedent could not have made a transfer "in contemplation of death". To say that in all these circumstances the "thought of death" was the "controlling motive" or "impelling cause" of her execution of the release of power would be to ignore wholly the real course of her thought.[7]

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[7] We assume for purposes of this petition the correctness of the Second Circuit's conclusion and the Tax Court's finding that Decedent's "dominant motive" in relinquishing the power was the saving of estate taxes. If the writ is granted, we should argue that the circumstances recited in the text challenge that holding also.

Allen v. *Trust Company of Georgia, supra*, 326 U. S. 630, is consistent with Petitioners' position that a dominant motive to save estate taxes cannot, without more, be ground for holding that the transaction was in contemplation of death.[8] There the decedent had created *inter vivos* trusts for his children, retaining a power to amend with the consent of the trustee and beneficiary. Upon being advised, following the decision of this Court in *Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85, that the gifts remained a part of his estate for estate tax purposes, the decedent executed an instrument renouncing the power to amend the trusts. "This was done", as this Court stated, "so that the trusts would not be a part of his estate for estate tax purposes" (326 U. S. at 633). This Court upheld the decisions below that there was no gift in contemplation of death because the power was released "to accomplish the purpose which [the decedent] originally had, but which he later discovered had not been achieved", "to meet the necessities of his children by giving them property, freed of all claims, tax or otherwise" (326 U. S. at 636). This Court concluded its opinion with the statement that the decedent's "desire to make adequate provision for [his children] remained the dominant motive, or so the triers of fact could properly find" (326 U. S. at 637); but it remains true that the *only* difference between the provision that the decedent had already made for his children and the provision made for them by his renouncing of the power to amend was the difference in estate taxes.

As an additional reason for granting the writ, we believe it to be important that this Court determine the relevance of the Act of September 23, 1950, Section 501(a),

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[8] We do not argue, for the purposes of this petition, the factual resemblance of this case to the *Allen* case, which the Tax Court, though distinguishing the cases, itself recognized (25a).

64 Stat. 962, to the proper application of the "contemplation of death" provisions of the estate tax statutes. That Act provides as to the estates of persons dying thereafter that no transfer or relinquishment of a power made more than three years prior to death shall be held to have been made in contemplation of death, but that a transfer or relinquishment of a power made within the three years "shall, unless shown to the contrary, be deemed to have been made in contemplation of death . . .". We urge that, whether or not a decedent died before its effective date, the Act has an important bearing on the issue raised by this case.

This enactment, we suggest, can be rationally read only as evidencing a basic limitation of the meaning of "contemplation of death" to instances where death is, if not "thought to be close at hand", at least a matter of particular concern in relation to a decedent's age and state of health, this being the only aspect of "contemplation of death" to which the three-year period is logically relevant. At the least, we suggest, this Court should be slow to permit a finding of "contemplation of death" on other grounds, *e.g.*, on the motive-to-avoid-estate-tax ground, which take no account of the period intervening between the transaction and death.

This Court will, we believe, take judicial notice of the wide extension in recent years of the study and practice of "estate planning", which is directed among other things to the arrangement of a client's affairs by the use of insurance, *inter vivos* trusts, and testamentary provisions so as to take advantage of the opportunities given by the statutes to minimize the diminution of one's property by estate taxes. Suppose that a young man in perfect health, and with no "particular concern" about death, adopts an estate plan motivated solely by advice directed to the saving of estate taxes, and is, unlike his contemporaries,

killed within three years in a plane accident. It would, we submit, be contrary to the inherent rationale of the Act of September 23, 1950, to permit a holding that this transfer was "in contemplation of death." If we are right in this, the same result should now be reached, in view of the definition of "contemplation of death" inherent in the 1950 Act, in cases (like the present case) involving the estates of decedents who died before the effective date of that Act.

The Court of Appeals (Appendix A, *infra*, pages 21-22) gave as a "short answer" to Petitioners' argument based on the 1950 Act the fact that Decedent died in May, 1949, before the effective date of the Act. Had Decedent died after the effective date of the Act there would have been no issue (the relinquishment of power having been made more than three years before her death). The "short answer" does not answer, but ignores, our argument.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. BENJAMIN,
Counsel for Petitioners.

November, 1957

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 321, 322, 323—October Term, 1956.

(Argued May 15, 1957 Decided August 30, 1957.)

Docket Nos. 24345-6-7

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ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and EMPIRE TRUST COMPANY, Executors,
Petitioners.

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

———::———

ESTATE OF MARY LOIS K. McINTOSH, deceased, RUSSELL L. McINTOSH and ST. LOUIS UNION TRUST COMPANY, Trustees and Transferees,
Petitioners.

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

———::———

ESTATE OF MARY LOIS K. McINTOSH, deceased, EUGENE KILPATRICK PERRY, Transferee,
Petitioner.

—v.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

———::———

Appendix A

Before:

CLARK, *Chief Judge*,

SWAN and POPE, *Circuit Judges*.

———::———

On Petition to Review Decisions of the Tax Court of the United States.

The Commissioner of Internal Revenue determined a deficiency in estate tax due from the Estate of Mary Lois K. McIntosh. The Estate and transferees of certain assets which the Commissioner included in the Estate for estate tax purposes filed three separate petitions for a redetermination of the deficiency in the Tax Court of the United States. After decisions of the Tax Court sustaining the Commissioner's determination, said petitioners have filed petitions for review of such decisions in this court. Affirmed.

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PULLMAN, COMLEY, BRADLEY & REEVES, *Attorneys for Petitioners in Nos. 24345 & 24346*, PARKER, DURYEE, BENJAMIN, ZUNINO & MALONE, *Attorneys for Petitioner in No. 24347;* Robert M. Benjamin, Arthur M. Comley, Raymond A. Carter, Frederick Pope, Jr., and Sidney D. Rosoff, of Counsel.

CHARLES K. RICE, Assistant Attorney General. Ellis N. Slack, Lee A. Jackson and Morton K. Rothschild, Attorneys, *for Appellee-Respondent.*

———::———

POPE, *Circuit Judge:*

The petitioners here are the Estate of Mary Lois K. McIntosh, deceased, and the above named transferees from

said estate. The Commissioner determined a deficiency in estate tax due from that estate, and determined the same deficiency against the other petitioners as transferees. Separate petitions for redetermination were filed in the Tax Court, but since the petitioning transferees conceded that if a deficiency was determined against the estate, the same decision must be made against them, all three petitions were consolidated for hearing in the Tax Court. Following the Tax Court's decisions upholding the Commissioner's determinations of deficiency, petitions to review were filed here, and all three were consolidated for briefing and hearing in this court.

The findings and opinion of the Tax Court are reported at 25 T. C. 794. Because we assume familiarity with those findings we make no effort to repeat them here. The Tax Court upheld the Commissioner on two separate grounds. In affirming we find it unnecessary in this opinion to do more than indicate the reasons why we approve the Tax Court's finding that the decedent released her power of appointment in contemplation of death within the meaning of § 811(d)(2) of the Internal Revenue Code of 1939.[1]

The deficiency here involved arises from the determination of the Commissioner that there should be included in

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[1] "Sec. 811. Gross Estate. * * * (d) Revocable Transfers.—* * * (2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph."

the estate for estate tax purposes the value of the property transferred in trust in 1929 by the trust instrument set out in the Tax Court's opinion. Under that trust, property previously owned by Mary Lois K. Perry (later Mary Lois K. McIntosh), the decedent, was conveyed to trustees to be held in trust "for the sole use and benefit of Mary Lois K. Perry * * * for and during her natural life," the entire net income to be paid to her in monthly installments. Following further provisions that she should have no power to sell, assign or anticipate any interest created by this instrument, it was provided as follows:

> "On the death of the said Mary Lois K. Perry, the trust hereby created shall end, and the entire trust estate created by this instrument, together with any and all accumulated and undistributed income therefrom, shall go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct. In the event that the said Mary Lois K. Perry shall die intestate, or should fail to exercise said power by her last will, then, on her death, the entire trust estate hereby created, together with any and all accumulated and undistributed income therefrom, shall go and pass to the then heirs at law of the said Mary Lois K. Parry [*sic*], under the statutes of descent and distribation of the State of Missouri, free of any trust whatever. * * * "

It was the power of appointment stated in the first sentence just quoted which was relinquished by the "Release of Power" copied in the Tax Court's findings. The case turns upon the question whether that relinquishment by Mary Lois K. McIntosh was in contemplation of her death within the meaning of § 811(d)(2).

The evidence was that for a considerable period prior to the execution of this "Release of Power," which occurred on November 4, 1943, Mrs. McIntosh had been seeking ad-

vice, and taking certain steps designed to avoid the payment of estate taxes. In 1941 the corporate trustee under the trust wrote her, answering an inquiry as to whether she could make a present assignment of trust income to her son, as follows:

> "• • • You cannot make a valid assignment of this income to your son, or in fact to any one, as it appears from the terms of this trust that the intention was to be certain that you personally receive the income produced by this trust fund. You do have the right to dispose of this fund in your will but from a tax standpoint it would seem desirable, if it is your desire that your son have this property, that you do not exercise this right.
>
> "You should, of course, have a will disposing of the property that you have other than that which is contained in this trust estate. The federal tax authorities under present practice tax the exercise of a power of disposition the same as if you owned the property if the power of disposition is exercised. If this power to dispose of the trust property is not exercised and this property is allowed to go to your son under the trust agreement, there would be a definite tax advantage. This does not mean that you shouldn't make a will. We strongly recommend that you have your attorney draw your will and advise you on these matters as we cannot undertake to give legal advice, and we would suggest that in the drafting of your will the tax situation be given full consideration."

As a result of this suggestion of the trustee, decedent consulted an attorney and made a new will which specifically refrained from exercising the power. This new will replaced an old one in which she had undertaken to exercise the power of appointment. Then came the Trustee's suggestion of May 27, 1943, that in the light of certain changes

in the 1942 Revenue Act, it would be well for decedent to review her power under the trust instrument. Upon advice of counsel she then executed the "Release of Power" above referred to. The letter from her attorneys, on which she acted, was devoted wholly to discussion of the recommended action as a procedure designed to avoid estate taxes.[2] The decedent's husband testified before the Tax Court that he knew of no reason for the relinquishment of the power other than the saving of taxes.

We think it clear that the power of appointment quoted above, whereby "the entire trust estate" should be made to "go to such parties and under such terms and conditions as the said Mary Lois K. Perry may, by her last will, direct," was, because of the circumstances attending the creation of the trust a reserved power, —a power "to alter, amend, or revoke," within the meaning of §811(d)(2) (footnote 1, *supra*). These circumstances were the manner in which decedent conveyed the properties to a young lawyer who executed the trust instrument merely as the nominal settlor of the trust. Hence the interest here involved was, in the language of §811(d)(2), one "of which the decedent • • • has made a transfer." *Lehman* v. *Commissioner*, 2 Cir., 109 F. 2d 99, 100.[3] And the power here was one to

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[2] The Tax Court alluded to the fact that decedent thought her relinquishment of the power would result in nontaxability. Petitioner suggests this was the result of an honest mistake on the part of both the attorneys who were not aware of the background of the trust which required the power to be treated for this tax purpose as a reserved rather than a donated power. Petitioners concede the correctness of the statement in footnote 2 of the Tax Court's opinion that the section of the Revenue Act of 1942 on which the attorney's advice was based had reference to donated powers only, and not to reserved powers as referred to in § 811(d).

[3] That case dealt with § 302(d) of the Revenue Act of 1932, the wording of which was the same as that of § 811(d) so far as here material. Other cases which have followed the *Lehman* case are cited in *Newberry's Estate* v. *Commissioner*, 3 Cir., 201 F. 2d 874, 877.

"alter, amend or revoke." Cf. *Lober* v. *United States*, 346 U. S. 335, *Comm'r* v. *Estate of Holmes*, 326 U. S. 480, *Porter* v. *Commissioner*, 288 U. S. 436.

This brings us to the final question, is the finding that the decedent relinquished the power in contemplation of her death a proper one upon this record? Although conceding that when she made the release decedent was in good physical condition and had no particular concern about dying, the court found that her purpose in releasing the power was to save estate taxes,—this was her "dominant motive." The evidence sufficiently sustains that finding. We see no basis on which it could be held to be clearly erroneous. This court has sustained a holding that transfers were made in contemplation of death when their preponderant motive was avoidance of estate taxes. *Slifka* v. *Johnson*, 2 Cir., 161 F. 2d 467, following *Vanderlip* v. *Commissioner*, 2 Cir., 155 F. 2d 152. The record abundantly justified a finding that "the thought of death [was] the impelling cause" of the release.[4]

Petitioner argues that decedent could have had no such dominant motive, for it was not she but the corporate trustee which took the initiative; that all that she did reflected "the passivity of her thought." Her acquiescence in the advice of others does not alter the fact that the advice she accepted was designed to avoid estate taxes. We agree with the Tax Court that it is immaterial that some of this advice was mistaken. (See footnote 2 above.) Petitioners note that in 1950 Congress added a new subdivision to §811 to the effect that no relinquishment made more than three years prior to date of death should be deemed to have been made in contemplation of death. (Act of September 23, 1950, 64 Stat. 962.) It is suggested that this indicates a Congressional disapproval of a holding such as that made by the Tax Court here where there is no showing that

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[4] The quoted language is from *United States* v. *Wells*, 283 U. S. 102, 118.

death was thought to be close at hand. The short answer is that the amendment thus made was expressly made applicable only to estates of decedents dying after that date. This decedent died May 21, 1949.

It is argued that the facts here are not distinguishable from those in *Allen* v. *Trust Co.*, 326 U. S. 630, where an opposite conclusion was reached. In that case, it appeared that the relinquishment of the power was made for the purpose of accomplishing fully, and in line with his original intention, decedent's purpose when he established trusts for his children, namely, to make complete gifts, freed of all claims, including taxes. On those facts two courts found the release was not made in contemplation of death. Here, on the contrary, the court entrusted with finding the facts has found, on sufficient evidence, that there was contemplation of death. The relinquishment here, made on November 4, 1943, cannot be related to an earlier effort to make a disposition having a "life intent," for the earlier actions in 1941 when the decedent substituted a new will specifically refraining from exercising the power, were all taken with the same purpose of avoiding taxes.

The decisions of the Tax Court are affirmed.

APPENDIX B

Judgments of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of August one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge
HON. THOMAS W. SWAN,
HON. WALTER L. POPE,
Circuit Judges

ESTATE OF MARY L. K. McINTOSH, et al
(EMPIRE TRUST CO.)
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

Appendix B

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. Daniel Fusaro, Clerk
by Ralph C. Curcio,
Deputy Clerk

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of August one thousand nine hundred and fifty-seven.

Present:

Hon. Charles E. Clark,
Chief Judge
Hon. Thomas W. Swan,
Hon. Walter L. Pope,
Circuit Judges

Estate of Mary L. K. McIntosh, et al
(St. Louis Union)
Petitioners

v.

Commissioner of Internal Revenue
Respondent

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk
by RALPH C. CURCIO,
Deputy Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of August one thousand nine hundred and fifty-seven.

Present:

HON. CHARLES E. CLARK,
Chief Judge

HON. THOMAS W. SWAN,
HON. WALTER L. POPE,
Circuit Judges

ESTATE OF MARY L. K. McINTOSH, Deceased, EUGENE KILPATRICK PERRY, Transferee
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent

Appendix B

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. Daniel Fusaro, Clerk
by Ralph C. Curcio,
Deputy Clerk

APPENDIX C

Statutes

Internal Revenue Code of 1939, Section 811(d)(2):

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

• • •

(d) REVOCABLE TRANSFERS.—

• • •

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

Act of September 23, 1950, Section 501(a)

SEC. 501. TRANSFERS IN CONTEMPLATION OF DEATH.

(a) Transfers, etc., in contemplation of death.—Section 811 (relating to gross estate) is hereby amended by striking out "(1)" at the beginning of

subsection (l) and inserting in lieu thereof "(m)", and by inserting after subsection (k) the following new subsection:

"(l) Contemplation of death.—If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of subsections (c), (d), and (f); but no such transfer, relinquishment, exercise, or release made prior to such three-year period shall be deemed or held to have been made in contemplation of death."

Revenue Act of 1942, Section 403:

SEC. 403. POWERS OF APPOINTMENT

(a) General rule. Section 811(f) (relating to powers of appointment) is amended to read as follows:

"**(f) Powers of appointment**

"**(1) In general.** To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, . . .

"**(2) Definition of power of appointment.** For the purposes of this subsection the term 'power of appointment' means any power to appoint exercisable by the decedent either alone or in conjunction with any person, except

"(A) a power to appoint within a class which does not include any others than the spouse of the decedent, spouse of the creator of the power, descendants of the decedent or his spouse, descendants (other than the decedent) of the cre-

ator of the power or his spouse, spouses of such descendants, donees described in section 812(d), and donees described in section 861(a)(3). As used in this subparagraph, the term 'descendant' includes adopted and illegitimate descendants, and the term 'spouse' includes former spouse; and

"(B) a power to appoint within a restricted class if the decedent did not receive any beneficial interest, vested or contingent, in the property from the creator of the power or thereafter acquire any such interest, and if the power is not exercisable to any extent for the benefit of the decedent, his estate, his creditors, or the creditors of his estate."

• • •

(d) Powers with respect to which amendments not applicable

• • •

(3) The amendments made by this section shall not apply with respect to any power to appoint created on or before the date of the enactment of this Act if it is released before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable; or if the decedent dies before January 1, 1943, or within the time limited by paragraph (2) in cases to which such paragraph is applicable, and such power is not exercised.